ing property by false pretences.[35] The right of the defendant to be more fully informed of the facts with which he is charged than he is by the indictment, where such further information may be necessary, is protected by giving him the right to demand a bill of particulars. In case of a material variance between the proof and such bill of particulars, the court may order the bill to be amended, and, in addition, may in its discretion in such a case postpone the trial or order a trial before a new jury.[36] Finally, in the schedule of the forms of criminal pleading annexed to the foregoing legislation a simple form of indictment is given,[37] with the provision that this form shall be sufficient to charge the crime to which it is applicable.[38] The courts of Massachusetts have held that this legislation fully protects the right of the accused to be sufficiently informed of the real accusation made against him.[39] It has also been held that an indictment alleging that the defendant did "feloniously steal, take and carry away" certain money, will, under these statutes, support a conviction founded on embezzlement.[40]

Nothing can be more admirable than the simplicity, ingenuity and fairness of this masterly legislation which fully protects the rights of the accused, while at the same time it does away with wasting the time of the court in deciding subtleties of law, which, far from being of any practical use, are a positive impediment to justice.

R. W. G.

State Taxation of Foreign Corporations Measured by Income.— Within the next five years the United States Supreme Court will doubtless have to pass upon some new and important developments in the ever-troublesome problem of taxing foreign corporations. The recent case of *Underwood Typewriter Co.* v. *Chamberlain* (Conn. 1919) 108 Atl. 154, indicates the difficulties involved. The Underwood Co. was a Delaware corporation, with its sole manufacturing plant at Hartford, Conn.; its revenue was derived chiefly from sales of its machines throughout the country, but a small percentage was from transactions wholly without the state of Connecticut. Connecticut taxed the concern in the following manner: The real estate and tangible personal property of the corporation within the state was taxed at its fair market value.[1] The corporation was then also required to pay a tax of two per cent on such proportion of its total net income as the value of its tangible real and personal property within the

[35]Mass. Stat. 1899, c. 409, § 24; Mass. Rev. Laws (1902) c. 218, § 40.

[36]Mass. Stat. 1899, c. 409, §§ 10, 13, 14, 16, 24, 27; Mass. Rev. Laws (1902) c. 218, § 39.

[37]"(1) That A. B. did steal one horse of the value of more (or less as the case may be) than one hundred dollars of the property of C. D. Or (2) That A. B. did steal six cows, each of the value of twenty dollars of the property of C. D." Mass. Rev. Laws (1902) c. 218, § 67, p. 1849.

[38]Mass. Rev. Laws (1902) c. 218, § 67, p. 1845.

[39]Commonwealth *v.* Kelley (1903) 184 Mass. 320, 323, 68 N. E. 346.

[40]Commonwealth *v.* McDonald (1905) 187 Mass. 581, 73 N. E. 852.

[1]Conn. Gen. Stat. Rev. 1918 §§ 1197-8.

state bore to the value of its total tangible property.[2] This tax was stated to be in lieu of any tax on moneys and bills receivable and all other taxes on the privilege of doing business;[3] it was laid on foreign and domestic corporations alike; no special penalties were attached for its non-payment; and payment was not made a condition precedent to doing business.[4] The Connecticut Supreme Court decided that this was an excise tax on the privilege of doing business, which did not regulate interstate commerce, and that the amount of income taxable, found in this case to be forty-seven per cent of the total net income, was determined in a fair and reasonable manner.

The United States Supreme Court has sanctioned taxes on the privilege of a foreign corporation to do local business which were in lieu of all other taxes on property and were measured by gross receipts,[5] provided the intangible values contributed by interstate commerce were not taxed twice.[6] Recently, in *Crew Levick Co.* v. *Pennsylvania*,[7] it indicated that a state levying such a tax must do more than verbally declare that the privilege is the subject of the tax and the receipts merely the measure; the court will look through the words and determine the actual effect. In *U. S. Glue Co.* v. *Oak Creek*,[8] a case on which the Connecticut court leaned heavily, the United States Supreme Court drew a substantial distinction between gross and net receipts, flatly declaring a tax on the latter to be only an indirect and incidental burden on interstate commerce;[9] and the logical inference is that if a state measures a privilege tax by net receipts, the court will find the statute satisfactory. It is true that the *Oak Creek* case presented certain differences from the principal case: there the tax was a general state-wide income tax, in lieu of all but realty taxes,[10] and the complainant was a domestic corporation. But the court, while not foreclosing itself from the future use of these last named differences, gave no indication that it considered them essential to make a tax nonregulatory, and in view of the marked liking evinced by it for the

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[2] *Ibid.*, §§ 1391-4.

[3] *Ibid.*, § 1401.

[4] *Ibid.*, § 1394.

[5] U. S. Express Co. *v.* Minnesota (1912) 223 U. S. 335, 32 Sup. Ct. 211; Cudahy Packing Co. *v.* Minnesota (1918) 246 U. S. 450, 38 Sup. Ct. 373. See also Maine *v.* Grand Trunk Ry. (1891) 142 U. S. 217, 12 Sup. Ct. 121, 163.

[6] Oklahoma *v.* Wells Fargo & Co. (1912) 223 U. S. 298, 32 Sup. Ct. 218; Galveston H. & S. A. Ry. *v.* Texas (1908) 210 U. S. 217, 28 Sup. Ct. 638. See 32 Harvard Law Rev. 385 *et seq.*

[7] (1917) 245 U. S. 292, 38 Sup. Ct. 126; see 18 Columbia Law Rev. 483.

[8] (1918) 247 U. S. 321, 38 Sup. Ct. 499.

[9] *Ibid.*, at pp. 328-9. "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."

[10] Wis. Stat. (1911) §§ 1087ml-2(3).

net income tax,[11] it seems improbable that it would decree against the Connecticut statute under the commerce clause.[12]

But the more difficult question then arises as to whether the rule adopted for determining the percentage of income taxable makes the tax subject to the vice of extra-territoriality and contrary to the principles first clearly enunciated in *Western Union Tel. Co.* v. *Kansas*.[13] The Underwood Co. claimed that it did because the law, in working out the proportion, took no account of the intangible values represented by the sales force and distributing agents outside the state. This, it was argued, operated to make the denominator of the fraction unduly small, and thus necessarily resulted in a tax on some income not earned within the state. It seems clear that the extra-state income of a foreign corporation should not be taxed,[14] but the company's contention would probably be overruled by the United States Supreme Court for two reasons. First, as far as can be learned from the decision,[15] no convincing evidence was presented to show to what extent the disregard of these intangibles worked unfairly, and the court always demands such evidence in full. Second, about ninety per cent of the company's gross revenue was derived from the sale of typewriters manufactured in Connecticut, and in the recent case of *American Manufacturing Co.* v. *St. Louis*,[16] the court enunciated the principle that

[11] *Cf.* Peck & Co. *v.* Lowe (1918) 247 U. S. 165, 38 Sup. Ct. 432.

[12] It seems plain, however, that a net income tax might be the means of taking double toll from interstate commerce, if the corporation's tangible property in the state were also taxed on its value to the company as a going concern. The Connecticut statute, however, simply taxes such property at its fair market value. Moreover, the excise tax is stated to be in lieu of any other taxes on moneys and bills receivable and all other taxes on the privilege of doing business, and the decision in Galveston H. & S. A. Ry. *v.* Texas, *supra*, footnote 6, hints that any "in lieu" provision will prevent the tax being held invalid on this ground. *Ibid.*, at pp. 226-7, interpreting Maine *v.* Grand Trunk Ry., *supra*, footnote 5.

[13] (1910) 216 U. S. 1, 30 Sup. Ct. 190. The doctrine of that case may be tersely stated as follows: Though the subject of the tax is a proper one, if the measure operates to take account of extra-territorial values, the tax is invalid. The complainant in that case was a telegraph corporation whose interstate and intrastate business were necessarily integrated, but subsequent cases have held that the same doctrine will be applied in the case of any corporation doing both kinds of business. Looney *v.* Crane Co. (1917) 245 U. S. 178, 38 Sup. Ct. 85; International Paper Co. v. Massachusetts (1918) 246 U. S. 135, 38 Sup. Ct. 292.

[14] Even the Connecticut majority in the principal case admitted this. Underwood Typewriter Co. *v.* Chamberlain (Conn. 1919) 108 Atl. 154, 159. See also Mr. Justice Brown's opinion in Union Refrigerator Transit Co. *v.* Kentucky (1905) 199 U. S. 194, 202-4, 26 Sup. Ct. 36, where his language clearly indicates that power over and protection to the recipient or source of income will be held essential to jurisdiction to levy an income tax.

[15] Underwood Typewriter Co. *v.* Chamberlain, *supra*, footnote 14, at pp. 159, 160.

[16] (1919) 250 U. S. 459, 39 Sup. Ct. 522. In this case the city of St. Louis, in addition to an *ad valorem* property tax, levied a tax of one dollar on every one thousand dollars of sales of all goods manufactured by the company in St. Louis, even though some of the goods were shipped to warehouses outside the state and sold to purchasers outside. The court declared that this method of taxation merely postponed the collection of an amount which might have been levied as soon as the goods were manufactured. See footnote 18, *infra*.

an excise on the manufacture of all goods manufactured within a state, measured by their sale value, is valid. If this is so, a tax measured by the income from the sales must also be valid and therefore the Underwood Co. could hardly claim unfair treatment when forty-seven per cent. of its net income was declared to be within Connecticut's reach.

Yet this contention[17] is fundamentally sound and if disregarded will unduly complicate the questions as to the *situs* of income which are certain to arise with increasing frequency as the income tax becomes more general. At first blush the *St. Louis* case may appear sound, but careful analysis will reveal that the value of a commodity at the factory is obviously not its sale value, unless we assume that manufacturing is the sole factor in producing income.[18] The cases which have gone into this matter most thoroughly[19] are probably sound in their contention that income may be taxed where earned, regardless of any power over the recipient, but they have not squarely faced the fact that manufacturing, selling, bill-collecting and advertising all contribute to the income derived from the sale of any commodity. Just how much each contributes is no easy matter to decide. The Connecticut statute plainly avoids the whole question[20] and probably no statute could provide an exact rule, for in the last analysis there must be an element of speculation in the matter. But it is submitted that the corporation itself could make a far better guess than the state. Under modern methods of accounting, a corporation could easily draw up an income account analyzing and allocating costs in such a way as to show the amount of net income earned in each state where it does business, and if the states were allowed to tax that amount only we would be brought squarely within the rule that a state may tax

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[17]Mr. Justice Wheeler, who dissented from the Connecticut majority, upheld this contention. To do so, he interpreted the St. Louis case as holding that the goods were taxable, not at their sale value, but at their value at the factory. It is to be hoped the United States Supreme Court will see its way clear to interpret the case the same way. See footnote 18, *infra*. Justice Wheeler also reasoned that a tax on net income was analogous to a tax on capital stock, and since the Connecticut statute provided no maximum amount it was invalid under Looney *v.* Crane Co., *supra,* footnote 13; see 18 Columbia Law Rev. 168.

[18]If the Underwood Co. had no distributing force the value of a typewriter at the factory would plainly be the price a wholesaler would pay for it. The fact that the Underwood Co. happens to be its own wholesaler cannot make the article worth more at that time. The logical result of the St. Louis case is that the state of manufacture and the state of sale can both tax the sale on different theories. The federal income tax also takes its toll from the same transaction, and if the state of incorporation can levy a general income tax because of its power over the recipient of the income, the same sale would be taxed four times on different theories. For an excellent argument against allowing the last-mentioned tax, see 32 Harvard Law Rev. 654-5.

[19]U. S. Glue Co. *v.* Oak Creek, (1915) 161 Wis. 211, 153 N. W. 241, *aff'd, supra,* footnote 8; Shaffer *v.* Howard (D. C. 1918) 250 Fed. 873.

[20]This appears plain if we assume a foreign corporation owning a million dollar warehouse in Connecticut and leasing a million dollar warehouse in each of four other states, and doing an equal amount of business in each. Plainly, one fifth of its income would be earned in each state, but the Connecticut law would require it to pay a tax on much more than twenty per cent of its net income.

only so much of the income of a foreign corporation as is earned within its jurisdiction. If in addition to this a further provision were added that in cases of dispute over the fairness of the corporation's allocation, the account should be submitted to an administrative official, presumably of the Treasury Department, whose decision should be final,[21] the courts would be relieved of a material number of cases which are more economic than legal in character.

UNFAIR COMPETITION AT COMMON LAW AND UNDER THE FEDERAL TRADE COMMISSION.—Until the middle of the nineteenth century there were very few cases decided on the doctrine of unfair competition,[1] but with the great increase in competition incident to the rapid development of business in the latter half of that century, men devised innumerable schemes whereby they took unfair advantage of their rivals, and the courts were forced to realize the necessity of protecting a man's business from the sharp practices of his competitor.

Perhaps the most common form of unscrupulous dealing is to appropriate or imitate the trade-mark of a person who has a well-established reputation in the community for the quality of his wares.[2] Although the deception of the public here is often spoken of as part of the wrong committed,[3] most courts regard it merely as a test to determine whether or not the plaintiff has suffered injury, which is the real cause for complaint.[4] Relief is of course granted in such a case, and this is so even where there is no fraudulent intent on the part of the defendant; the plaintiff's right of property in the label or trade-mark being made the basis of the remedy.[5] A right of action exists not only against the person who adopts the trade-mark of another, but also against the one who furnishes him with the labels[6] and against one who manufactures similar labels, although they may possibly be

[21]A somewhat similar method has been adopted for deciding on the necessity of obstructions in navigable rivers. 26 Stat. 454, 30 Stat. 1151, U. S. Comp. Stat. 1916, § 9910; Monongohela Bridge Co. *v.* United States (1910) 216 U. S. 177, 195, 30 Sup. Ct. 356.

[1]Nims, Unfair Competition and Trade-Marks (2nd ed.) § 2.

[2]See "Singer" Machine Mnfrs. *v.* Wilson (1877) L. R. 3 A. C. 376; Dennison Mfg. Co. *v.* Thomas Mfg. Co. (C. C. 1899) 94 Fed. 651; *cf.* Moet *v.* Couston (1864) 33 Beav. 578.

[3]*Cf.* G. W. Cole Co. *v.* American Cement & Oil Co. (C. C. A. 1904) 130 Fed. 703; Sartor *v.* Schaden (1904) 125 Iowa 696, 101 N. W. 511.

[4]C. F. Simmons Co. *v.* Mansfield Drug Co. (1893) 93 Tenn. 84, 23 S. W. 165; Borthwick *v.* The Evening Post (1888) L. R. 37 Ch. D. 449.

[5]McLean *v.* Fleming (1877) 96 U. S. 245; "Singer" Machine Mnfrs. *v.* Wilson, *supra,* footnote 2; see G. W. Cole Co. *v.* American Cement & Oil Co., *supra,* footnote 3, at p. 705; Leather Cloth Co. *v.* American Leather Cloth Co. (1863) 4 De G. J. & S. *137, *142; *contra,* Blanchard *v.* Hill (1742) 2 Atk. 484; see Crawshay *v.* Thompson (1842) Man. & Gr. *357—the holding and the *dictum* in these last two cases are clearly not law in England today.

[6]Hildreth *v.* Sparks Mfg. Co. (C. C. 1899) 99 Fed. 484; Hennessy *v.* Herrmann (C. C. 1898) 89 Fed. 669.